defendant should become the second defendant. He should be described in the statement of claim as trading under the style of 'Sharikat Termaju Abadi'.

The plaintiff has already obtained judgment against the first defendants and suggests that in those circumstances, the court should treat Hj Mohamad as having admitted the plaintiff's claim. The reason given by the plaintiff for this startling submission is that Hj Mohamad was in partnership with the first defendants, but the plaintiff accepts that that allegation is not admitted or accepted by Hj Mohamad. The court cannot try on this interlocutory application the question of partnership or no partnership, and it is impossible for the court to give judgment on the alleged admission based on this ground. I have seen nothing in the pleadings in this action nor anywhere else which amounts to 'a clear admission of facts in the face of which it is impossible for the party making it to succeed': see *Ellis* v *Allen*[1] per Sargant J at p 909. The alternative ground on which the plaintiff seeks judgment on admissions arises as follows.

The plaintiff says that the buyers jumped the gun by obtaining premature delivery of the cattle, the subject of the contract of sale, from the shipping agents. They did not tender the shipping documents to the shipping agents but nevertheless got hold of the cattle. In those circumstances, says the plaintiff, there was a conversion of the cattle by Hj Mohamad because he was one of those who collected these cattle from the shipping agents without tendering the shipping documents.

The admission here relied on, in relation to the cattle, consists of an indemnity given by Hj Mohamad to the shipping agents. There are two instruments, one showing delivery on 27 July 1987 which applies to some of the cattle and one showing delivery on 4 August 1987 which relates to the remainder. I am prepared, for the purposes of this application, to treat these instruments as evidencing receipt by the consignee, whose signature appears thereon, of the cattle in question; but in no way, as it seems to me, do these instruments constitute the sort of admission on which a judgment on admissions can be obtained.

For this purpose, the admission must be a clear admission of all, and not simply evidence of some, of the facts upon which the plaintiff would have to rely to establish his cause of action. There is no such admission. In these circumstances, I propose to dismiss this application.

Order accordingly.

Solicitors: *David Clidero & Co; DF Abang Zen.*

Reported by *Ng Sheau Jiuan*

Public Prosecutor v Abdul Rahim bin Hj Ahmad & Ors

HIGH COURT (BANDAR SERI BEGAWAN) – CRIMINAL MOTION NO 6 OF 1988
GODFREY J
27 JUNE 1988

Criminal Procedure – Bail – Application for – Accused charged with rape – Medical report showing complainant may not have been raped – Whether relevant factor in granting bail – Adjournments of hearing – Accused in custody for a considerable time – Whether bail should be granted

The three applicants were arrested and charged with the offence of rape. They were released on bail but were subsequently re-arrested. They applied for bail twice but their applications were refused. This is their third application for bail. In this application, counsel for the applicants pleaded that (a) there had been a change of circumstances since the two unsuccessful applications were heard in that there was now available to the court a medical report showing that the complainant may not have been raped at all; (b) the preliminary inquiry for the case had been delayed for a further six weeks and the applicants had already been in custody for a considerable time (about four months since the date of their re-arrest).

Held, allowing the bail application on terms: (1) It is not for the court to evaluate the medical report. It will be a matter for the trial judge to decide the question whether the intercourse took place with or without the complainant's consent.

(2) Even though the court must be careful to ensure that between the date of an alleged offence of rape and the date of hearing the victim is offered a fair and proper degree of protection, there cannot be such a degree of protection as warrants the incarceration for months of persons who may be innocent of the offence.

(3) Two conditions of the grant of bail are imposed in that the applicants should report once in the morning and once in the evening to the nearest police station and that they do not approach near the premises where the complainant lives.

David Clidero for the three applicants/accused.

Cur Adv Vult

Godfrey J: This is an application for bail. The applicants are three persons accused of the very serious charge of rape. The rape is said to have been committed on 11 January 1988 by the three applicants. They were, on that day, arrested and taken into custody.

On 12 January 1988, they appeared in the magistrate's court. On 13 January 1988, the first applicant was released on bail, and on 19 January 1988, the second and third applicants were released on bail.

On 22 February 1988, they were re-arrested and on 24 February 1988, they were charged with the offence to which I have referred. They applied for bail to Mr Justice Mortimer on 25 February 1988 and their applications were refused. They renewed their applications to Mr Justice Mayo on 16 April 1988 and their applications were again refused.

Mr Clidero, for the applicants, says that there has been a change of circumstances since these two unsuccessful applications were heard. He says, first, that there is now available to this court a medical report, which was not available on the earlier hearings, which shows or at least suggests that the complainant may not have been raped at all, whether by these applicants or by anybody else. It is not for me to evaluate the medical report. It will be a matter for the trial judge to decide the question whether the intercourse (which is admitted) took place with or without the complainant's consent. However, there is no doubt that the report is, to say the least, consistent with intercourse having taken place with the consent of the complainant.

Secondly, Mr Clidero goes on, the case was originally due to come before the court for a preliminary inquiry on 13 June 1988, but that hearing has had to be adjourned. I am told by the prosecution that the inquiry will now take place on 25 July 1988, a delay of some six weeks. From my recital of the chronology, it will be apparent that these three applicants have already been in custody for a considerable time. One of them has five children of his own.

Understandably, the complainant is concerned that she shall not be harassed by these applicants or indeed anybody else. Rape has a traumatic effect on the victim and the court must be careful to ensure that, between the date of an alleged offence of rape and the date of the hearing, the victim is offered a fair and proper degree of protection, but in my judgment that cannot be such a degree of protection as warrants the incarceration for months (unless there is other good cause) of persons who may, for all the court knows, be innocent of the offence.

In these circumstances, I propose to grant bail upon conditions. I will impose as a condition of the grant of bail that these three applicants should each of them report once in the morning and once in the evening to the nearest police station on the understanding that that police station is not more than 1½ miles away from the place where each of them lives.

I also propose to make it a condition of granting bail that they do not approach near the premises where the complainant lives. I want it to be quite clear that they are to keep well away from the complainant. Subject to those conditions, I propose to allow this application, and I will discuss further details with counsel.

Order accordingly.

Solicitors: *David Clidero & Co.*

Reported by *Ng Sheau Jiuan*

MALAYSIAN REPORTS

Malaysia Building Society Bhd v Lesco Development Corpn Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C8369 OF 1985
SITI NORMA YAAKOB J
5 AUGUST 1988

Civil Procedure – Judgment in default of appearance – Application to vary – Interest awarded in excess of statutory rate – Whether judgment a nullity – Whether court has jurisdiction to vary judgment to reflect the correct rate of interest – Condition that defendant will not be prejudiced by such amendment – Rules of the High Court 1980, O 2 rr 1 & 2, O 42 r 12

The plaintiff obtained a judgment in default of appearance against the first defendant for the principal sum claimed together with interest at 13.5% pa. However, under the then O 42 r 12 of the Rules of the High Court 1980, the only rate of interest allowed on a judgment sum was 8% pa. On realizing that the judgment carried the wrong interest rate, the plaintiff applied to have the judgment varied under O 20 r 11 and under the inherent jurisdiction of the court, so as to reflect the correct rate of interest. The application was allowed by the senior assistant registrar and the first defendant appealed against this decision.

Held, dismissing the appeal: (1) The effect of non-compliance with O 42 r 12 of the Rules of the High Court 1980 does not render the judgment a nullity as O 2 r 1 treats such failure to be an irregularity which can be remedied under r 2 of the same order. The court is empowered to cure such a judgment provided that the first defendant will not be in any way prejudiced by such an amendment.

(2) The first defendant has already applied to have the same judgment set aside (on other grounds) and the matter was pending when the appeal was heard. Since the amendment does not have the effect of preventing the first defendant from proceeding with this pending and separate application, it cannot be said that the first defendant will be unduly prejudiced by the amendment.

Legislation referred to
Rules of the High Court 1980 O 2 rr 1 & 2, O 20 r 11, O 42 r 12

G Krishnan for the first defendant/appellant.
Grace Lim for the plaintiff/respondent.

Cur Adv Vult

Siti Norma Yaakob J: The only issue that merits consideration in this appeal is whether the court has any curative jurisdiction to vary a judgment in default of appearance, so as to show the correct rate of interest after judgment.

There were other issues raised, particularly as to whether the judgment is a nullity as the first defendant contended that the certificate of non-appearance was issued before the period of entry of appearance had expired. I had restrained from directing my mind on these